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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

STATE OF CALIFORNIA, et al.,

Plaintiffs,

v.

DAVID BERNHARDT, et al.,

Defendants.

Case No. 4:18-cv-05712-YGR
(Consolidated with No. 4:18-cv-05984-YGR)

**JOINT STATEMENT REGARDING
PROCEDURAL HISTORY**

SIERRA CLUB, et al.,

Plaintiffs,

v.

DAVID BERNHARDT, et al.,

Defendants.

1 Pursuant to the direction of the Court at the February 11, 2019 case management
2 conference, the parties to the above-entitled actions hereby submit this Joint Statement Regarding
3 Procedural History.

4 **2016**

5 On November 18, 2016, the U.S. Bureau of Land Management (“BLM”), an agency
6 within the U.S. Department of the Interior, finalized the Waste Prevention, Production Subject to
7 Royalties, and Resource Conservation rule (the “Waste Prevention Rule”). 81 Fed. Reg. 83,008
8 (Nov. 18, 2016). BLM stated that it promulgated the Waste Prevention Rule “to reduce waste of
9 natural gas from venting, flaring, and leaks during oil and natural gas production activities on
10 onshore Federal and Indian (other than Osage Tribe) leases,” and to “clarify when produced gas
11 lost through venting, flaring, or leaks is subject to royalties, and when oil and gas production may
12 be used royalty-free on site.” *Id.* Among other requirements, the Waste Prevention Rule
13 prohibited the venting of natural gas by operators except in certain limited situations, and required
14 that oil well operators capture defined percentages of the gas produced each month. *Id.* at
15 83,023–24. It also required that operators inspect equipment for leaks of natural gas; repair any
16 such leaks; replace equipment that contributes to the loss of natural gas during oil and gas
17 production; recover fugitive gas emissions from certain storage tanks and other equipment; and
18 measure and report vented and flared volumes. *Id.* at 83,011–12, 83,022–24. The Waste
19 Prevention Rule had an effective date of January 17, 2017, although many of its requirements,
20 including those related to gas capture, measurement of vented and flared gas volumes, equipment
21 replacement, and leak detection and repair, were to phase-in with compliance required on January
22 17, 2018. *Id.* at 83,023–24, 83,033.

23 Soon after the Waste Prevention Rule was finalized, the Western Energy Alliance (“the
24 Alliance”) and Independent Petroleum Association of America (“IPAA”), followed by the States
25 of Wyoming and Montana (collectively, “Petitioners”), filed legal challenges in federal district
26 court in Wyoming, alleging that the Waste Prevention Rule regulated air pollution which BLM
27 lacks statutory authority to regulate, and that the Waste Prevention Rule was arbitrary and
28 capricious. *Western Energy Alliance v. Jewell*, Case No. 2:16-cv-00280-SWS (D. Wyo. Petition

1 filed Nov. 16, 2016); *State of Wyoming v. Jewell*, Case No. 2:16-cv-00285-SWS (D. Wyo.
 2 Petition filed Nov. 18, 2016). The States of California and New Mexico (in this action, the “State
 3 Plaintiffs”), as well as most of the Conservation and Tribal Citizen Group Plaintiffs in this action,
 4 intervened on the side of BLM in defense of the Rule; the States of North Dakota and Texas
 5 intervened on the side of Petitioners. The American Petroleum Institute (“API”) was granted
 6 *amicus curiae* status in the case. The parties briefed and argued motions for a preliminary
 7 injunction filed by Petitioners.

8 2017

9 On January 16, 2017, the Wyoming district court denied Petitioners’ motions for a
 10 preliminary injunction, concluding that Petitioners had not demonstrated the four prerequisites for
 11 relief. *State of Wyoming v. U.S. Dep’t of the Interior*, 2017 WL 161428, *4–11 (D. Wyo. Jan. 16,
 12 2017).

13 On January 17, 2017, the Waste Prevention Rule became effective, although compliance
 14 with the majority of the Waste Prevention Rule’s requirements would not be required until
 15 January 17, 2018.

16 On March 28, 2017, President Donald Trump issued Executive Order 13783, entitled
 17 “Promoting Energy Independence and Economic Growth.” 82 Fed. Reg. 16,093 (Mar. 31, 2017).
 18 Section 1 of that Executive Order stated the administration’s policy position that “[i]t is in the
 19 national interest to promote clean and safe development of our nation’s vast energy resources,
 20 while at the same time avoiding regulatory burdens that unnecessarily encumber energy
 21 production, constrain economic growth, and prevent job creation.” *Id.* Section 1 of the Executive
 22 Order further stated that “it is the policy of the United States that executive departments and
 23 agencies (agencies) immediately review existing regulations that potentially burden the
 24 development or use of domestically produced energy resources and appropriately suspend, revise,
 25 or rescind those that unduly burden the development of domestic energy resources beyond the
 26 degree necessary to protect the public interest or otherwise comply with the law.” *Id.* Section 7
 27 of the Executive Order, entitled “Review of Regulations Related to United States Oil and Gas
 28 Development,” specifically called on the Secretary of the Interior to review and, “if appropriate,”

1 “as soon as practicable, . . . publish for notice and comment proposed rules suspending, revising,
2 or rescinding” the Waste Prevention Rule. *Id.* at 16,096.

3 On March 29, 2017, then-Secretary of the Interior Ryan Zinke issued Secretarial Order
4 3349, which provided that within 21 days, BLM would review the Waste Prevention Rule and
5 report to the Assistant Secretary “whether the rule is fully consistent with the policy set forth in
6 Section 1 of the March 28, 2017 E.O.” BLM published the results of its review on October 24,
7 2017, finding that the Waste Prevention Rule is “inconsistent with the policy stated in EO13783”
8 and that it “poses a substantial burden on industry, particularly those requirements that are set to
9 become effective on January 17, 2018.” *See* 82 Fed. Reg. 50,532, 50,535 (Nov. 1, 2017).

10 On June 15, 2017, BLM published a notice in the Federal Register “to postpone the
11 compliance dates” for the provisions of the Waste Prevention Rule that required compliance on
12 January 17, 2018 pursuant to Section 705 of the Administrative Procedure Act (“APA”), 5 U.S.C.
13 § 705. 82 Fed. Reg. 27,430 (June 15, 2017) (“Postponement Notice”). BLM explained that it
14 postponed the compliance dates for certain provisions of the Waste Prevention Rule because
15 Petitioners in the Wyoming litigation had “raised serious questions concerning the validity of
16 certain provisions of the Rule” and “operators should not be required to expend substantial time
17 and resources to comply with regulatory requirements that may prove short-lived as a result of
18 pending litigation or the administrative review that is already under way.” *Id.* at 27,431. On July
19 5, 2017, the State Plaintiffs filed a complaint challenging the Postponement Notice in the
20 Northern District of California. Case No. 3:17-cv-03804-EDL (N.D. Cal.). The Conservation
21 and Tribal Citizen Group Plaintiffs filed a similar action on July 10, 2017. Case No. 3:17-cv-
22 03885-EDL (N.D. Cal.). The Court related the two cases on July 24, 2017. The Alliance and
23 IPAA, along with the State of North Dakota, intervened on the side of BLM. The parties briefed
24 and argued Plaintiffs’ motions for summary judgment, as well as BLM’s motion to transfer the
25 case to Wyoming.

26 On September 7, 2017, the Court denied BLM’s motion to transfer.

27 On October 4, 2017, the Court ruled that BLM lacked authority to postpone the
28 compliance dates of the Waste Prevention Rule under 5 U.S.C. § 705, that BLM violated the

1 APA's notice and comment procedures, and that the Postponement Notice was arbitrary and
 2 capricious. *See California v. U.S. Bureau of Land Mgmt.*, 277 F. Supp. 3d 1106 (N.D. Cal. 2017).
 3 Consequently, the court vacated the Postponement Notice. *Id.* at 1127.

4 On October 5, 2017, BLM published a proposed rule in the Federal Register that would
 5 suspend for one year, until January 17, 2019, certain requirements of the Waste Prevention Rule.
 6 82 Fed. Reg. 46,458 (Oct. 5, 2017). These requirements included those covered by the now-
 7 vacated Postponement Notice that had compliance dates in January 2018, as well as certain other
 8 provisions for which compliance dates had already passed.

9 After receiving public comment, on December 8, 2017, BLM issued its final rule
 10 suspending certain requirements of the Waste Prevention Rule. 82 Fed. Reg. 58,050 (Dec. 8,
 11 2017) ("Suspension Rule"). BLM stated that it "has concerns regarding the statutory authority,
 12 cost, complexity, feasibility, and other implications of the 2016 final rule, and therefore intends to
 13 avoid imposing likely considerable and immediate compliance costs on operators for
 14 requirements that may be rescinded or significantly revised in the near future." *Id.* On December
 15 19, 2017, the State Plaintiffs, as well as the Conservation and Tribal Citizen Group Plaintiffs,
 16 challenged the Suspension Rule in the Northern District of California and moved for a
 17 preliminary injunction. Case No. 3:17-cv-07186-WHO (N.D. Cal.); Case No. 3:17-cv-07187-
 18 WHO (N.D. Cal.). The Court related the two cases on December 28, 2017. The Alliance, IPAA,
 19 API, and the States of North Dakota and Texas intervened on the side of BLM.

20 Separately, on December 29, 2017, the Wyoming court granted BLM and Petitioners'
 21 joint motion to stay proceedings in that case "in light of the Suspension Rule and the fact that the
 22 BLM is in the process of issuing a proposed Revision Rule" to revise the Waste Prevention Rule.
 23 Order Granting Joint Motion to Stay, *Wyoming v. U.S. Dep't of the Interior*, No. 16-cv-0285-
 24 SWS, ECF No. 189.

25 2018

26 On February 22, 2018, the Court in the Suspension Rule cases granted the motions for
 27 preliminary injunction, finding that BLM had "failed to provide the requisite reasoned analysis in
 28 support of the Suspension Rule, and it is therefore arbitrary and capricious within the meaning of

the APA.” *California v. Bureau of Land Mgmt.*, 286 F. Supp. 3d 1054, 1068 (N.D. Cal. 2018). In analyzing the “irreparable harm” prong of the four-prong preliminary injunction standard, the Court also found that the Suspension Rule was likely to result in “concrete harms that BLM’s own data suggests are significant and imminent,” such as emissions of methane, volatile organic compounds (“VOCs”), and other hazardous pollutants. *Id.* at 1073-75. Consequently, the Court preliminarily enjoined the Suspension Rule. *Id.* at 1076. The Court also denied the motions to transfer. *Id.* at 1060-63.

On February 22, 2018, BLM published in the Federal Register a proposed rule to rescind or revise certain requirements of the Waste Prevention Rule. 83 Fed. Reg. 7,924 (Feb. 22, 2018). BLM proposed to rescind several provisions of the Waste Prevention Rule including: (1) waste minimization plans, (2) gas-capture percentages, (3) well drilling requirements, (4) well completion and related operations requirements, (5) pneumatic controller requirements, (6) pneumatic diaphragm pump requirements, (7) storage vessel requirements, and (8) leak detection and repair requirements. *Id.* at 7,928. The proposal also modified requirements related to gas capture, downhole well maintenance and liquids unloading, and measuring and reporting volumes of flared and vented gas. *Id.*

Between February 26, 2018 and February 28, 2018, Petitioners in the litigation before the U.S. District Court for the District of Wyoming filed motions requesting that the court preliminarily enjoin or stay certain provisions of the Waste Prevention Rule. On April 4, 2018, following briefing on these motions, the Wyoming district court issued an Order staying implementation of the Waste Prevention Rule’s provisions with January 2018 compliance deadlines. *State of Wyoming v. U.S. Dep’t of the Interior*, Case No. 2:16-cv-00285-SWS, ECF No. 215 (“Order Staying Implementation of Rule Provisions and Staying Action Pending Finalization of Revision Rule”) (the “Stay Order”). The Wyoming court explained that the order was necessary “to preserve the status quo, and in consideration of judicial economy and prudential ripeness and mootness concerns,” in light of BLM’s efforts to revise the Waste Prevention Rule, and did not apply the four-factor analysis for preliminary injunctions. *Id.* at 10. In a subsequent order denying a motion for a stay pending appeal to the U.S. Court of Appeals for

1 the Tenth Circuit, the Wyoming court clarified that it issued the Stay Order pursuant to 5 U.S.C.
 2 § 705. *State of Wyoming v. U.S. Dep't of the Interior*, Case No. 2:16-cv-00285-SWS, ECF No.
 3 229.

4 On April 5 and 6, 2018, the Conservation and Tribal Citizen Group Plaintiffs and State
 5 Plaintiffs, respectively, appealed the Wyoming court's Stay Order to the Tenth Circuit Court of
 6 Appeals. The Tenth Circuit denied initial motions for a stay pending appeal and for dismissal of
 7 the appeal. *State of Wyoming v. U.S. Dep't of the Interior*, Nos. 18-8027, 18-8029 (10th Cir.)
 8 (Order dated June 4, 2018).

9 On September 28, 2018, BLM issued a final rule entitled "Waste Prevention, Production
 10 Subject to Royalties, and Resource Conservation; Rescission or Revision of Certain
 11 Requirements," which is the subject of the current case. 83 Fed. Reg. 49,184 (Sept. 28, 2018)
 12 (the "Rescission/Revision Rule"). State Plaintiffs filed their complaint when the
 13 Rescission/Revision Rule was signed on September 18, 2018, and filed a first amended complaint
 14 on October 10, 2018. Case No. 4:18-cv-05712-YGR (N.D. Cal.). State Plaintiffs also filed an
 15 administrative motion to consider whether cases should be related in the Suspension Rule case,
 16 which the Court denied on September 25, 2018. *California v. Bureau of Land Mgmt.*, Case No.
 17 3:17-cv-07186-WHO, ECF Nos. 121, 125. The Conservation and Tribal Citizen Group Plaintiffs
 18 filed their complaint on September 28, 2018. Case No. 4:18-cv-05984-YGR (N.D. Cal.). At the
 19 request of the parties, the Court consolidated these cases on November 5, 2018. Case No. 4:18-
 20 cv-05712, ECF No. 45. The State of Wyoming, the Alliance, IPAA, and API have intervened on
 21 the side of BLM.

22 On October 11, 2018, following publication of the Rescission/Revision Rule, BLM filed a
 23 motion in the Tenth Circuit to dismiss the appeal in *Wyoming v. U.S. Dep't of the Interior* as moot.
 24 The parties in the Tenth Circuit agree that the Rescission/Revision Rule moots the appeal of the
 25 Stay Order, but disagree on the appropriate remedy. The Tenth Circuit has informed the parties
 26 that the matter will be submitted on the briefs on March 18, 2019.

27 On October 18, 2018, the parties in the Suspension Rule cases filed a joint motion to hold
 28 the cases in abeyance pending expiration of the Suspension Rule on January 17, 2019. The court

1 granted this motion on October 22, 2018. *California v. Bureau of Land Mgmt.*, Case No. 3:17-cv-
2 07186-WHO, ECF No. 126. The parties intend to obtain dismissal of that case.

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Respectfully submitted,

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